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No.

IN THE

Supreme Court of the United States

October Term, 1980

LACLEDE GAS COMPANY,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF MISSOURI,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

JURISDICTIONAL STATEMENT

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October 10, 1980

QUESTION PRESENTED

The Missouri Supreme Court rejected Appellant Laclede Gas Company's claim that the order of the Missouri Public Service Commission here in question is in violation of the First and 14th Amendments to the Constitution of the United States. The question presented is

> Whether the Commission's order prohibiting Laclede Gas Company from including in its allowable costs for ratemaking purposes the prudent cost of certain of its advertising expenses is in violation of Appellant's right to free speech guaranteed by the First Amendment to the Constitution?

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

JURISDICTIONAL STATEMENT

Laclede Gas Company ("Laclede") the Appellant, appeals from the final judgment of the Supreme Court of the State of Missouri, dated July 15, 1980, denying Appellant's request for review of a decision of the Court of Appeals (Western District) of the State of Missouri. That decision held that an order of the Public Service Commission of Missouri (the "Commission") denying the right of Appellant to include in its allowable costs for ratemaking purposes prudent costs incurred by it in connection with certain of its advertising is *not* invalid as being violative of Appellant's rights to free speech and due process of law guaranteed by the First and 14th Amendments of the Constitution of the United States. Appellant submits this

statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial Federal constitutional questions are presented.

OPINIONS BELOW

The order of the Supreme Court of the State of Missouri is not reported and is included in the Separate Appendix hereto as Appendix A. The opinion of the Missouri Court of Appeals, Western District, is reported in 600 S.W. 2d 222 (1980) and is included in the Separate Appendix as Appendix B. The opinion, dated October 23, 1978, of the Circuit Court of Cole County of the State of Missouri is not reported and is included in the Separate Appendix as Appendix C. The order of the Commission, dated April 21, 1978, is reported in 25 P.U.R. 4th 51 and is included in the Separate Appendix as Appendix D. The order of the Commission, dated May 1, 1978, denying Laclede's application for rehearing is included in the Separate Appendix as Appendix D-1. The opinion of the Circuit Court of Cole County, dated March 28, 1978, as amended on March 30, 1978, is not reported and is included in the Separate Appendix as Appendix C-1. The order of the Missouri Public Service Commission, dated July 1, 1977 is not reported and is included in the Separate Appendix as Appendix D-2. The order of the Commission, dated July 19, 1977, denying Laclede's application for rehearing, is included in the Separate Appendix as Appendix D-3.

JURISDICTION

On April 16, 1976, Laclede, a public utility engaged in the sale of natural gas in the State of Missouri, filed revised rate schedules with the Commission. Among other things, Laclede claimed the prudent cost of its advertising as an expense allowable in the determination of the level of its rates. The Commission twice suspended the proposed effective date of the proposed rate schedules, and on April 21,

1978, issued an order (Appendix D) requiring Laclede to file, in lieu of its proposed tariffs, new tariffs designed to increase gross revenues by an amount which, among other things, did not make provision for those of Laclede's advertising costs which the Commission considered to be for goodwill.[1]

Before the Commission, Laclede argued that to deny it the ability to include in its allowable costs for ratemaking purposes its prudent advertising costs was a violation of the First and 14th Amendments of the United States Constitution. The Commission rejected Laclede's constitutional contentions and disallowed certain of those costs in establishing Laclede's rates. The Circuit Court of Cole County for the State of Missouri and the Missouri Court of Appeals each in turn affirmed the order of the Commission, rejecting Laclede's claim that such order violated its rights under the United States Constitution. The Supreme Court of Missouri denied Laclede's petition to review the decision of the Missouri Court of Appeals.[2]

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1. The Commission had, on July 1, 1977, previously issued an order in this proceeding (Appendix D-2), but on April 21, 1978 issued its amended report and order in response to the direction of the Circuit Court of Cole County (Appendix C-1), requiring further findings of fact. It is this April 21, 1978 order (that, in effect, reaffirmed the order of July 1, 1977) which is the subject of these proceedings.

2. Saying that the proceeding involved issues of general public interest which create an overriding influence (Appendix B, page A-7), the Missouri Court of Appeals refused to grant the Commission's request that the appeal be dismissed on the basis of the Commission's contention that, because Laclede was no longer charging the rates authorized by the Commission's order of April 21, 1978, the question of the validity of that order had become moot with respect to the advertising charges which are the subject of this appeal. The correctness of the Missouri Court of Appeals' decision refusing to grant the Commission's request for dismissal of the appeal is exemplified by *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911), involving an order of two years duration of the Interstate Commerce Commission, where the questions involved, as they are here, were usually continuing and their consideration ought not to be defeated by short-term orders, capable of repetition, yet evading review. A finding of mootness is precluded where "in the absence of a class action '(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same

The order of the Missouri Supreme Court was entered on July 15, 1980 (Appendix A). Appellant's Notice of Appeal to this Court was filed with the Missouri Supreme Court and with the Missouri Court of Appeals on October 8, 1980 (Appendix E). Because the action of the Commission is the equivalent of a statute of Missouri for jurisdictional purposes, jurisdiction to review the judgment of the Missouri Supreme Court is conferred on this Court by 28 U.S.C. § 1257(2). *Williams* v. *Bruffy*, 96 U.S. 176 (1878); *Lake Erie & Western R.R. Co.* v. *Public Utilities Commission*, 249 U.S. 422 (1919); *Live Oak Water Users' Ass'n.* v. *Railroad Commission*, 269 U.S. 354 (1926); *Atchison, Topeka & Santa Fe R. Co.* v. *Public Utilities Commission*, 346 U.S. 346 (1953); *Lathrop* v. *Donohue*, 367 U.S. 820 (1961).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

First Amendment, United States Constitution

> Congress shall make no law . . . abridging the freedom of speech . . . .

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action again.'" [citation omitted] *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 774 (1978). See also, *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175 (1968).

The matter here in issue, the question of the abridgement by an administrative agency, through its rate-making powers, of the Federal Constitutional rights of a public utility, meets these criteria. Because of ever increasing costs experienced in the past decade and continuing in the present, a public utility is regularly forced to seek new rates in order to permit it to continue to provide service to the public. Filings occurring every 18 or 24 months are not uncommon, and the question of the allowance of advertising expenses is a perennial issue. Indeed, Laclede filed revised rate schedules on January 3, 1978 and again on February 7, 1980. Because of the time required to prosecute in the courts an appeal of a commission decision, it is not unlikely that a utility's new rate schedule will be in effect prior to the receipt of a final judicial determination. If this situation were to cause every appeal by the utility to be dismissed on the grounds of mootness, commission orders would be effectively insulated from judicial review. Where, as here, a claim is made of a violation of an appellant's rights under the First and 14th Amendments, such insulation should not be countenanced.

Fourteenth Amendment, United States Constitution

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The order of the Commission disallowing for ratemaking purposes certain of Laclede's advertising costs incurred provides in part (Appendix D, page A-38):

> "The Commission finds that the Company's test-year advertising expense (i.e., TV, radio, newspaper and magazine) charged to sales amounted to $424,090. Of this amount, the Commission concludes that $219,399.40 represents informative advertising or advertising designed to promote conservation, safety, or off-peak gas use. Such advertising is an allowable expense for ratemaking. The remainder of Company's advertising (i.e., $204,691.00) is merely aimed at promoting good-will and is of no direct customer benefit. Good-will advertising will not be allowed for ratemaking purposes."

The relevant provisions of the Missouri Public Service Law, pursuant to which the Public Service Commission issued its order and held by the Missouri Court of Appeals to authorize the issuance of that order, are set forth in Appendix F.

STATEMENT OF THE CASE

In its order of April 21, 1978, the Commission allowed for ratemaking purposes expenses incurred for certain categories of advertising (*i.e.*, conservation, safety, off-peak load building and information), but disallowed for ratemaking purposes expenses it associated with goodwill-type advertising:

> "Generally speaking, this type of advertising is aimed at creating a favorable image of the Company or the Company's product in the public's view. The Commission is of the opinion, and so finds, that this type of advertising is of no direct benefit to the ratepayers and ought not to be borne by them in their rates. The Commission does recognize, however, the need to establish uniform guidelines with respect to the issue of advertising so as to put utility companies and ratepayers on specific notice as to what types of advertising will, or will not, be permitted as an allowable expense for ratemaking purposes. For purposes of this discussion, however, the criteria set out by this Commission in Re Kansas City Power & Light Company, *supra*, is appropriate and serves as a basis from which to work until this Commission has had an opportunity to conduct a generic type proceeding on this issue."

(Appendix D, page A-68.)

Included among the advertising categorized as "goodwill" was "advertising directed at the theme 'conservation through efficient residential use of gas' " and "the cost of a newspaper advertisement taken out by the Company during its labor negotiations with the union in fiscal year 1976". (Appendix D, pages A-70 and A-73.)

The Commission's order disallowing these expenses for ratemaking purposes was affirmed by the Circuit Court and Court of Appeals of Missouri. The Supreme Court of Missouri denied Laclede's petition for review of the Court of Appeals' decision.

In its petition before the Circuit Court of Cole County, as before the Commission, Laclede explicitly questioned the validity of the Commission's order disallowing for ratemaking purposes certain of Laclede's advertising expenses under the First and 14th Amendments to the United States Constitution, and asserted there, as well as before the Missouri Court of Appeals and the Missouri Supreme Court, that such order was in violation of the

United States Constitution. The Missouri Court of Appeals upheld the order, and the Missouri Supreme Court refused to hear an appeal from the Court of Appeals' judgment that the order did not violate Laclede's Federal constitutional rights.

THE FEDERAL QUESTION IS SUBSTANTIAL

Laclede contends that the order of the Commission disallowing for ratemaking purposes costs incurred in connection with certain of its advertising characterized by the Commission as "goodwill" in nature is plainly inconsistent with and invalid under the ruling and rationale of *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 100 S.Ct. 2343, 48 U.S.L.W. 4783 (June 20, 1980). In that case, this Court held that a ban on promotional advertising was in violation of the First Amendment to the United States Constitution. If upheld, the Commission's refusal to allow for ratemaking purposes the cost of advertising which may not lawfully be banned effectively eviscerates the *Central Hudson* holding.

1. *By denying Laclede the opportunity to include in rates prudent costs for certain advertising characterized by the Commission as goodwill in nature, the Commission would render nugatory Laclede's First Amendment right to engage in such advertising.*

In *Central Hudson*, the Court held that a ban on promotional advertising by a regulated utility deprived the utility of the First Amendment's protection for its commercial speech. In doing so, the Court noted (at page 2352) the existence of interfuel competition and the fact that, for consumers in those competitive markets, advertising by utilities is just as valuable as advertising by unregulated firms. Much of Laclede's advertising disallowed by the

Commission falls within that category, and Laclede contends that such advertising is primarily directed to informational and promotional ends, rather than being goodwill in nature.

Moreover, the Court pointed out, even in monopoly markets, advertising may be of value to customers, stating (at page 2352):

> "In the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising. [footnote omitted] Since no such extraordinary conditions have been identified in this case, appellant's monopoly position does not alter the First Amendment's protection for its commercial speech."

In that context, the Court expressly noted (at footnote 11 on page 2356) that the economic decision whether to advertise is not distorted by permitting recovery from consumers of the advertising costs, stating:

> "Unregulated businesses pass on promotional costs to consumers, and this Court expressly approved the practice for utilities in *West Ohio Gas Co.* v. *Public Utilities Comm.*, 294 U.S. 63, 72 (1935)."

Laclede recognizes that ratemaking bodies are not bound to the use of any single formula or combination of formulas. As applied to the instant situation, the Commission could have provided for the advertising costs as allowable expenses or in the allowed rate of return, or conceivably in some other manner.[3] But the fact is that it did none of those things, adopting instead the sweeping position that

3. In *West Ohio*, the Court reversed an order of the Ohio Commission after describing the question before it as "whether the rate of return has been further overestimated to the point of confiscation through error in the rejection of charges upon income" (at page 67).

"good-will advertising will not be allowed for ratemaking purposes".

In upholding, in *Central Hudson*, the right of a regulated public utility to engage in advertising, the Court articulated a four-step analysis applicable to the evaluation under the Federal Constitution of restrictions on commercial speech, saying (at page 2351):

> "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."

No claim is made by the Commission that the advertising here concerned is either unlawful or misleading. Even if we assume, which we do not, that the governmental interest in disallowing the cost of goodwill advertising for ratemaking purposes is substantial, and that such a regulation does directly advance that interest, the "critical inquiry" then becomes, as it did in *Central Hudson*, whether the regulation undertaken "is no more extensive than necessary to further the State's interest". (*Central Hudson,* at page 2353.)

As reflected in *Central Hudson*, a state's interests in the operations of a public utility are many, and include the providing of service at reasonable rates, and energy conservation. Indeed, a sizable portion of the $204,691[4] of Laclede's advertising costs which were disallowed as being for "goodwill" advertising was spent in order to urge consumers to use gas in place of electricity for all the jobs gas

4. Laclede's total operating revenues during the test-year were determined by the Commision to be $219,220,049 (Appendix D, page A-37).

performs more efficiently in the home (Appendix D, page A-70). The public has a right to this information for "[e]ven in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment." *Central Hudson*, at page 2352.

In *Central Hudson*, this Court held that because the New York Commission did not demonstrate that its interest cannot be protected adequately by more limited regulation of the commercial expression there concerned, the complete suppression of Central Hudson's advertising was violative of the First Amendment. Because the Missouri Commission likewise has made no such showing, its action in denying the allowance of advertising expenses for ratemaking purposes—which can only have the effect of reducing if not eliminating the amount of such advertising—must also fall.

The necessity to protect Constitutional rights by invalidating significant, though indirect, burdens on their exercise was demonstrated in *Sherbert* v. *Verner*, 374 U.S. 398 (1963). As described therein, that case involved a claim for unemployment insurance benefits by a member of the Seventh Day Adventist Church who had been discharged by her employer because she would not work on Saturday, and could not obtain other employment because for conscientious scruples she would not take Saturday work. The South Carolina Employment Security Commission found that this restriction upon the employee's availability for Saturday work brought her within the provision disqualifiying for benefits insured workers who failed without cause to accept suitable work when offered, a position which was upheld by the South Carolina Supreme Court. In reversing the judgment, this Court found that the dis-

qualification for benefits imposed a burden on the free exercise of religion, saying (at page 403):

> "In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. For '[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.' [citation omitted] Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. . . . Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."

The Court added (at page 406) that "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."

Similarly, in *Talley* v. *California*, 362 U.S. 60 (1960), the Court invalidated a State statute barring distribution of handbills unless there was printed on them the names and addresses of the persons who prepared, distributed or sponsored them. On the grounds that the ability to criticize anonymously was at times essential to being able to criticize at all, the Court said (at page 64), "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression."

In the course of the ratemaking proceeding, the Commission's staff witness admitted[5] that the penalty upon Laclede's exercise of its rights imposed by the Commission has as its intended effect the discouraging of certain of Laclede's advertising. In, *Grosjean* v. *American Press Co., Inc.*, 297 U.S. 233 (1936) the Court invalidated a gross receipts tax on newspapers, saying (at page 250):

> "The tax here involved is bad not because it takes money from the pockets of the appellees. . . . It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties."

Unregulated businesses are permitted to reflect in the calculation of their charges to customers the costs of exercising their First Amendment rights. To deny a regulated business the right to do the same is an act *calculated to limit circulation of information.* If we have the right to speak (and *Central Hudson* is only the latest affirmation of that inviolate right) the State may not employ "regulatory measures ... no matter how sophisticated ... in purpose or in effect to stifle, penalize, or curb the exercise of [that] right." *Louisiana* v. *NAACP*, 366 U.S. 293, 297 (1961). This is especially important where the most likely source of

5. Q. Certainly the effect of disallowing as an operating expense is at least, would at least discourage such use of advertising, wouldn't you agree to that? A. Yes.

Q. And, do you think that is desirable? A. You are asking for my opinion, sir?

Q. Yes, sir? A. Mr. Eckhart, this advertising was analyzed as part of the larger context of the sales expenses. And, another test that was put to was the benefit to the ratepayer. And, we attempted to make a good judgment on the basis of those kind of things.

Q. I don't believe that you have answered my question. The question is, do you consider it desirable to discourage the use of advertising of gas for other than off-peak use? I think that can be answered yes or no. Do you consider it desirable, or do you not? A. In the current situation we find ourselves in, I would say I, the answer to your question would be yes, I do. Testimony of R. J. Liddy (Transcript, Page 1694).

informed comment or criticism of a governmental agency's policies is the individual or company subjected by that agency to restrictions on its speech.

2. *The distinction drawn by the Commission between recoverable and nonrecoverable advertising expenses is so vague that Appellant's right to advertise at all is threatened.*

The Commission's definition of "goodwill advertising" is "advertising designed to promote a favorable image of the Company". (Appendix D, page A-66.) Because a function of all advertising is to promote a favorable image of the Company, Laclede submits that the Commission's purported guidelines distinguishing between expenses which are allowable for ratemaking purposes and which are not is illusory, and that all of Laclede's expenses for advertising are in jeopardy of disallowance.

This problem is exemplified by the difficulty the staff witness had in categorizing advertising expenses (Appendix D, page A-66). Furthermore, Laclede does not agree with the Commission's determination as to what constitutes "good-will" advertising, contending, instead, that much of the advertising disallowed by the Commission as "goodwill advertising" was properly for promotional purposes or to encourage conservation.

Consequently, the order of the Commission is invalid under the rationale of *Hynes* v. *Borough of Oradell*, 425 U.S. 610, 620 (1976), where the Court invalidated a city ordinance regulating canvassing saying, "The general test of vagueness applies with particular force in review of laws dealing with speech". *See also, Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926) holding invalid a statute the terms of which are "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." This judgment is equally applicable to the Commission's "definition" of "goodwill"

advertising, especially because the "standards of permissible statutory vagueness are strict in the area of free expression." *NAACP* v. *Button*, 371 U.S. 415, 432 (1963).

CONCLUSION

For all of the foregoing reasons, the Appellant respectfully submits that the Federal question presented by this appeal is substantial and of public importance and this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Dated: October 10, 1980

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of October, 1980, copies of the foregoing Jurisdictional Statement and of the Separate Appendix thereto were mailed, by first class mail, postage prepaid, to the Missouri Public Service Commission, P.O. Box 360, Jefferson City, Missouri 65102, attention Kent Ragsdale, Esq., General Counsel. I further certify that all parties required to be served have been served.

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